Final Brief Oral Argument Scheduled April 1, 2019

Nos. 18-1153, 18-1091

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FIRST STUDENT, INC., A DIVISION OF FIRST GROUP AMERICA

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC, LOCAL 9036

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR UNION

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February 22, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the Union certifies the following:

A. Parties and Amici

First Student, Inc., a Division of First Group America was the Respondent before the Board and is the Petitioner/Cross-Respondent before the Court. Local 9036, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, ALF-CIO/CLC was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *First Student Inc., A Division of First Group America,* 366 NLRB No. 13 (February 6, 2018).

C. Related Cases

This case has not previously been before this or any other court. Union counsel is not aware of any related cases.

Respectfully submitted,

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
Act or NLRA	National Labor Relations Act, 29 U.S.C. § 151 et seq.
ALJ	Administrative Law Judge
Board or NLRB	National Labor Relations Board
District	Saginaw School District
First Student or Company	First Student, Inc., a Division of First Group America
JA	The parties' deferred joint appendix
NLRB Br.	NLRB's brief
Pet. Br.	First Student's opening brief
School Board	Saginaw County Board of Education
Union	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO/CLC and its Locals, 8410 and 9036
USW	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO/CLC

STATEMENT OF JURISDICTION

The Union hereby incorporates and adopts the NLRB's Statement of Jurisdiction as if fully set forth herein. (NLRB Br. 1-2).[1]

STATEMENT OF THE ISSUES PRESENTED

The Union hereby incorporates and adopts the NLRB's Statement of the Issues Presented as if fully set forth herein. (NLRB Br. 3).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in First Student's brief.

STATEMENT OF THE CASE

I. Background and the Start of the Subcontracting Process in 2011

Until 2012, the Saginaw School District ("District") directly employed school bus drivers and bus assistants, or monitors, to perform transportation services. (JA 629; 34). The District and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW"), on behalf of its local,[2] (hereinafter referred to

[1] "NLRB Br." refers to the NLRB's brief and "Pet. Br." refers to First Student's opening brief. "JA" refers to the parties' deferred joint appendix.

[2] The unit of transportation employees in Saginaw was originally assigned by the USW to its Local 8410, which represents only public sector workers. (JA 4-5). After the transportation contract was awarded to First Student, the USW started a process to reassign the unit to its Local 9036, which represents private-sector workers. (JA 23-25, 59-60). The Board in its decision referred to the USW and Local 8410 and Local 9036 as joint representatives and collectively as "Union" and rejected each of First Student's arguments concerning the internal union

together as "Union"), were parties to a collective bargaining agreement ("CBA"), with effective dates from August 27, 2010, through August 31, 2012, covering the bus drivers and bus assistants. (JA 629; 194, 197).

In 2011, the District started to consider subcontracting these services. (JA 640; 76). It issued a request for proposals and First Student, Inc. ("First Student" or "Company") submitted a proposal, along with two other companies. (JA 640; 163). During this process, the Saginaw County Board of Education ("School Board") asked that each bidding contractor be prepared to "partner" with the District and commit to transition the drivers and bus assistants from public to private employment without causing them "harm" – "because these were employees and part of our family." (JA 88-89, 103). The School Board wanted the contractors to transition the employees at "the same rate of pay" and with fringe benefits "comparable" to those the drivers and bus assistants got as public employees. (JA 103, 109, 163, 168).

In July 2011, the District interviewed First Student and the other competing contractors. (JA 640; 76-78). Dr. Kelley Peatross, the District's Assistant Superintendent, invited USW Staff Representative Tonya DeVore to attend, and DeVore attended, the July 2011 First Student interview. (JA 640; 35-36, 114-15;

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decision to reassign the unit. (JA 629). First Student does not raise any of these arguments to this Court.

361). During that interview, First Student's Business Development Manager, Daniel Kinsley, stated that First Student would recognize the Union "if we hire 51 percent or more of [the] current labor force;" further stated it was First Student's intention to hire as many of the current employees as possible; and explained that First Student had "a good record of high percentages of retaining" employees after obtaining contracts with school districts at other locations—"over 80, 85, 90 percent in a lot of cases." (JA 640; 141-44). Kinsley explained during this meeting that First Student would hire all of the transportation employees who met First Student's hiring criteria—*i.e.*, passed a background check, drug screen, and physical exam and, for drivers, had a current commercial driver's license. (JA 640; 54-55). These requirements were virtually identical to those that the District applied to all of its transportation employees, and which the employees had already met; and drug testing of school bus drivers is a Department of Transportation requirement. (JA 630; 14, 37-39, 66, 74, 185).

First Student never said that it would change the employees' terms and conditions of employment once they transitioned to First Student employment. (JA 54-55). On the contrary, Kinsley told the Union and the District that First Student would maintain the employees' wages and provide comparable benefits. (JA 640; 35-37).

Following the July 2011 interviews, the District prepared two similar documents summarizing the proposals made by First Student and the other two companies. (JA 640; 359-60, 235-36). These summaries were available to the employees, the public, and the Union. (JA 640; 79-80, 89-90; 357-60). Dr. Peatross testified that the charts accurately reflected First Student's commitments "presented both verbally and in writing." (JA 81, 86, 87-90). One of the charts reflects the following First Student commitments:

> **Staffing**…All qualified current staff will be hired.
> **Union**…Will recognize union.
> **Wages**…Will maintain current wages and receive future raises.
> **Seniority**…Staff would retain their seniority.
> **Benefits**...Aetna insurance which is comparable to existing insurance.

(JA 235-36, bold added).

In October 2011, the District informed First Student that it would be the company "they would look to partner with" and at a subsequent meeting the School Board voted to approve the contract with First Student. (JA 640; 144-45). However, the District's Superintendent decided in November 2011 not to proceed with subcontracting the transportation services for that school year. (JA 640). The District informed First Student that it was going to "hold off for [that] year." (JA 145-46).

II. The Continuation of the Subcontracting Process in 2012

First Student maintained contact with the District, and just a few months later, in early 2012, the District met with First Student and asked that it submit a new proposal for a contract for the 2012-2013 school year. (JA 98, 146; 237-39). First Student submitted a proposal on February 3, 2012, which was only slightly revised from its prior proposal. (JA 629-30, 641; 146; 237-39, 345). On February 10, the District's Superintendent recommended to the School Board that it award a five-year transportation contract, worth approximately $9.5 million dollars, to First Student. (JA 237-39). Later in February, the District held a mandatory meeting for all transportation employees and, at that meeting, the District told the bargaining unit employees that "the district had in fact decided to go with First Student back in October, but they still were hammering out some details." (JA 6, 11).

A. The March 2 Mandatory Meeting for Transportation Employees

The District held another mandatory meeting for all of the transportation employees on March 2 with two representatives from First Student—Kinsley and Douglas Meek, the area General Manager. (JA 630, 641; 99, 149). Meek testified at the hearing before the ALJ that the purpose of the meeting was "to relieve the anxiety of the employees." (JA 126, 136). At the meeting, First Student officials repeated the assurances that Kinsley made in July 2011.

Meek responded to unit employees' questions by assuring that First Student would recognize the union if it hired "51 percent" of the employees, that First Student "wanted to hire as many" of the employees "as possible," and that "typically we hired 80 to 90 percent of the existing workforce." (JA 630, 641; 122-23, 130). Meek testified that he said this "more than once" to "relieve the anxiety of the employees." (JA 136). Bus assistant Millie Stidhum-Stewart testified that at the March 2 meeting First Student said that "as long as they hired 50 percent plus one, they would recognize the Union" and, when asked by an employee what would happen if they "didn't hire 50 percent plus one," "[t]hey said in all the years they have been doing this, they usually hire 80 percent so they weren't worried about the 50 percent plus one." (JA 64, 72). Indeed, as Kinsley testified, it was First Student's "intention" and "goal" to hire the majority of the transportation employees. (JA 164-65). And, ultimately, First Student did in fact hire most of the employees, "consistent with [its] goal and [its] other locations." (JA 165).

Stidhum-Stewart also testified that the First Student officials did not say that "any term and condition of employment would be different" at the time employees "transitioned" to First Student. (JA 64-65). Rather, Meek told the employees to expect a "smooth transition." (JA 73). During the meeting, Dr. Peatross assured the employees that their pay rates would remain the same with First Student, that First Student would provide benefits "comparable" to those provided by the

District, and that First Student would hire the District employees who passed the background check, drug screen, and physical. (JA 82-85, 99). First Student did not dispute these assurances, but rather, expressed "acknowledgement." (JA 84-85). Meek further responded to employees' questions regarding other specific terms and conditions of employment by assuring employees that that "all those items would be subject to negotiations" with the Union. (JA 630, 641; 151). Lastly, an employee asked how many hours of work First Student would guarantee and Meek responded that First Student would use the District's routing system, but it would not be able to provide information regarding hours until the routes were established. (JA 630, 641; 123-24).

B. The May 16 School Board Meeting

In early May, First Student and Saginaw reached agreement on the terms of a transportation services contract. (JA 630, 642). The School Board held a public meeting on May 16 during which it asked Kinsley questions and considered the issue of whether to approve the contract with First Student. (JA 166-67, 172-73). Also present at the meeting were Dr. Peatross, USW representative DeVore, and members of the transportation bargaining unit. (JA 630, 642; 12-13).

At the meeting, Kinsley reiterated the assurances First Student made throughout the subcontracting process. As Peatross testified, the "focus of the meeting was ensuring that the employees received the same rate of pay and then

also the comparable benefits because that was the concern of the board and the superintendent." (JA 101-103). Kinsley again assured that First Student would maintain the employees' rates of pay and provide benefits "comparable" to those drivers and bus assistants had as District employees. (JA 14, 21-22, 103). In addition, Kinsley again assured that the unit employees would be hired by First Student if they passed the background check, drug screen, and physical, which, again, were requirements virtually identical to those used by the District and already met by the unit employees. (JA 630, 642; 14, 20-22, 26-27, 33, 38-39, 66, 74, 102-103).

Further, Kinsley again assured that First Student would recognize the Union if it hired 51% of the current workforce. (JA 630, 642; 153-54, 164-65). Kinsley, like the other First Student officials, always coupled references to the "51 percent" with assurances that the percentage would not be a problem. In particular, Kinsley stated it was First Student's "intention" and "goal" to hire "the majority" of the District transportation employees and coupled his "51 percent" references with assurances that First Student was "union friendly," that First Student intended a "smooth transition," that First Student usually hires "over 80, 85, 90 percent," "between 80 [and] 90 percent" of school district employees when it takes over public school transportation, and that First Student "intended to hire a majority." (JA 40, 64, 72, 73, 143, 164-65, 171).

Kinsley did not say at the School Board meeting that First Student would impose a "two-tier wage schedule" or make other changes in the terms of the transportation employees' employment. (JA 642; 15, 40, 169). The cross-examination of Kinsley at the hearing before the ALJ included the following exchange:

> Q: You didn't tell them that any terms and conditions of employment would change once they became First Student employees, did you?
> A: That wasn't a question I was asked.
> Q: So you didn't say that?
> A: I did not say that.

(JA 642; 169).

After Kinsley urged the School Board to take "swift action," the School Board voted to award the $9.5 million transportation contract to First Student. (JA 630, 642; 40, 56, 101).

Kinsley met with DeVore and some unit employees in the parking lot immediately after the School Board meeting. (JA 630, 643). By Kinsley's account, he again assured the group that if the employees met First Student's "hiring criteria"—the "background checks, and so forth;" "criteria" virtually identical to the District's standards which the employees already met—the employees "shouldn't have anything to worry about coming to work" for First Student and that First Student was "union friendly." (JA 643; 14, 38-39, 66, 74, 157, 170-71). By others' accounts, Kinsley repeated the assurances he made at the School Board

meeting, the March 2 meeting, and earlier: that the employees' "wages would be maintained," that the employees and the union "have nothing to worry about," that "everything will be the same," that First Student is "union friendly" and will recognize the Union, and that the Union and the employees need not "worry" because "everything will be fine." (JA 643; 16, 28-29, 41-42, 63).

C. The May 17 Mandatory Meeting for Transportation Employees

The District held another mandatory meeting of all transportation employees on May 17, the day after the School Board voted to award the $9.5 million contract to First Student. (JA 630, 643). First Student officials Kinsley and Meek conducted the meeting, opening by welcoming the employees to First Student. (JA 17, 71, 134-35, 186). The First Student officials then detailed the "transition" and dropped the proverbial "other shoe," making the first-time announcement that there would be unilateral changes in employment terms. (JA 630, 643; 131-32).

First Student distributed a memo to employees inviting them to apply for employment. The memo began "Welcome to First Student." (JA 240). The memo said that everyone who met the hiring criteria would be offered employment. (JA 630, 643; 240-41). The memo also set forth several terms and conditions of employment that were different from the employment terms set forth in the Union's CBA with the District. (JA 630, 643-44). The memo announced that First Student would maintain the employees' current wage rates only as "A" rates

applying to certain work, and that for other work—*e.g.*, training—it would impose lower "B" rates. (JA 630, 643-44; 241). A bus driver's hourly "A" rate, for example, was to remain $15.23, but the driver's hourly "B" rate, for non-driving work, would be $10, a decrease of approximately 34%. (JA 30). The memo also stated that the number of guaranteed hours would be substantially lower than what had been guaranteed under the CBA with the District. (JA 630, 643-44; 241). Following First Student's announcements and the distribution of the memo, the employees were "upset" and complained that the changes were contrary to First Student's assurances that their wages and "everything else" would remain the same. (JA 133-34, 137-38, 191-93).

D. First Student Takes Over and Hires Most of the Bargaining Unit

First Student issued letters offering employment to two transportation unit employees on June 27, 2012, a third on July 11, and the remainder on August 1. (JA 645; 372-455). By August, First Student hired a substantial majority of the transportation unit employees—all but three or four out of 50 to 55 in the unit, between 90% and almost 95%. (JA 645; 31-32; General Counsel Exhibit 1(m), ¶6(b)).

III. First Student Ignores the Union and Then Conditions Bargaining on the Withdrawal of an NLRB Charge

DeVore sent a bargaining demand to Kinsley on May 18. Kinsley received it, but never responded. (JA 644; 158; 310-13). DeVore reached out to Meek later

in May to request bargaining, but Meek told DeVore, "I have nothing to talk to you about." (JA 644; 46, 129; 314). Meek referred DeVore to First Student attorney Audrey Adams-Mondock. (JA 644). Adams-Mondock got DeVore's bargaining demand in June, but responded that hiring was incomplete and DeVore asked if she could contact her again in July, to which Adams-Mondock agreed. (JA 644; 187-88; 315). DeVore made several attempts to do so, but Adams-Mondock never returned DeVore's phone calls. (JA 645; 49-50, 189). At some point, Adams-Mondock's colleague, Todd Logan, took over when Adams-Mondock went on leave in late August. (JA 190).

In the meantime, as DeVore was attempting to find someone at First Student who would respond to her requests to engage in bargaining with the Union, on August 27, First Student distributed a new attendance policy, which contained changes to various provisions of the CBA between the District and the Union. First Student started operations shortly thereafter, employing drivers and monitors under the new terms and conditions of employment it had announced on May 17. (JA 644-45; 19, 67-70; 194-234, 245-307, 308-309; 372-455).

Receiving no response from Adams-Mondock or Logan by the end of August, on August 29, DeVore wrote to John Kiraly, First Student's location manager for the Saginaw unit, and again requested that First Student engage in negotiations with the Union. (JA 645; 316-17). In addition, DeVore enlisted the

help of bargaining unit officials in her attempt to get First Student to schedule bargaining. First Student representatives told the unit president that the Union should contact Kristen Huening. (JA 645; 50-51). The following day, DeVore wrote to Huening. (JA 318-19). After not receiving a reply for two weeks, DeVore called Huening who told her that she would not handle the negotiations and referred DeVore to another First Student attorney, Raymond Walther. (JA 645; 52-53).

On September 18, shortly after receiving Walther's name, DeVore sent him an email asking that he call her. (JA 645; 324). Walther responded to DeVore's email on September 21, stating that he would be her contact while Adams-Mondock was on leave, but that he would not be handling negotiations. (JA 645; 323).

The Union filed an NLRB charge on September 21, 2012 alleging that First Student was refusing to bargain in violation of its obligations as a successor employer.[3] (JA 645; 344). DeVore emailed Walther on September 25, after the charge was filed, and stated that she would like to start negotiations as soon as possible. (JA 645-46; 323). Walther wrote to DeVore that First Student would bargain only if the Union withdrew the charge. (JA 646; 321-22). DeVore replied

[3] At a later point, this charge was withdrawn and the underlying charge in this case was filed.

to Walther, stating that she was "disappointed" that First Student was conditioning negotiations on the Union's withdrawal of the charge. (JA 646; 320-21). Eventually, the parties agreed to begin negotiations in October, and, five months after the Union's May 18 bargaining demand, the parties first met for bargaining, on October 17, 2012. (JA 646; 320).

IV. The NLRB Proceedings

The Union filed the underlying charge in this case on October 29 alleging that First Student violated the Act in several respects. (General Counsel Exhibit 1(a)). Following issuance of a complaint, a hearing was held before ALJ Mark Carissimi on July 24-25, 2013. (JA 636; General Counsel Exhibit 1(c)). The ALJ determined that First Student unlawfully implemented a new attendance policy and delayed bargaining with the Union. (JA 629, 651-52). First Student and the Union each filed exceptions, and the General Counsel filed cross-exceptions, to the ALJ's decision. (JA 629).

The Board affirmed the ALJ's findings that First Student violated Sections 8(a)(1) and (5) of the Act by unilaterally implementing a new attendance policy and by delaying bargaining. (JA 629). The Board also found, contrary to the judge, that First Student was a perfectly clear successor employer and that it violated Sections 8(a)(1) and (5) of the Act by failing to provide the Union with notice and an opportunity to bargain before imposing initial terms and conditions

of employment for unit employees. (*Ibid*.). In addition, the Board also found, contrary to the ALJ, that First Student violated the Act by conditioning the commencement of bargaining on the Union's agreement to withdraw its original unfair labor practice charge. (JA 629, fn. 3).

With regard to the perfectly clear successor issue, the Board found that "[f]rom the very beginning of the transition process" First Student "clearly and consistently communicated its intent to retain the School District's unit employees." (JA 631). Further, the Board held that First Student did not "clearly announce its intent to establish a new set of conditions prior to or simultaneously with its expression of intent to retain the unit employees." (*Ibid*.).

The Board rejected the ALJ's conclusions concerning First Student's statements that certain matters would be "subject to negotiations," explaining that even "perfectly clear successors" are not required to adopt an existing CBA. (JA 631). Rather, as the Board explained, "a successor's announcement that it will not be adopting the predecessor's bargaining agreement and that certain terms of employment would be subject to negotiations conveys nothing more than a statement of law –that the status quo may change as a result of negotiations, but not in advance of them." (*Ibid*.).

Further, the Board concluded that the ALJ erred in finding that First Student's statements at the March 2 meeting concerning the number of guaranteed

hours somehow put employees on notice that there would be changes in their initial terms and conditions of employment. (JA 632). As the Board found, First Student's statement that it did not know how many hours would be guaranteed because that would depend on the routes established by the District's routing system "merely indicated that it would continue to use the School District routing system . . . but did not have information regarding routes at that time." (*Ibid*.). In addition, the Board determined that the ALJ "misapplied well-established precedent" in holding that First Student's announcement of new terms and conditions on May 17 was sufficient to avoid "perfectly clear successor" status. (*Ibid*.). As the Board explained, it

> has consistently held that a subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employee without making it clear that their employment is conditioned on the acceptance of new terms.

(*Ibid*.).

The Board concluded and held that First Student became a "perfectly clear" successor, with an obligation to bargain over initial terms, when it first expressed an intent to retain the District's employees without clearly announcing an intent to establish different initial terms of employment." (JA 633). Therefore, First Student violated Sections 8(a)(1) and (5) of the Act by announcing and implementing

unilateral changes to the unit employees' terms and condition of employment on May 17, 2012. (*Ibid*.).

SUMMARY OF ARGUMENT

While the general rule is that successor employers may set initial terms and conditions for incumbent employees without first bargaining with the employees' union, the Supreme Court created an exception to the rule for so-called "perfectly clear" successors. The Board has explained that a successor must first bargain with the union where that successor has expressed an intent to retain incumbent employees and has not clearly announced an intent to establish initial terms of employment. The Board established its standard for finding perfectly clear successors in *Spruce Up Corp.*, 209 NLRB 149 (1974). The Board's *Spruce Up* standard is intended to balance an employer's interest in its freedom to restructure failing businesses with the employees' interest in prompt notification of changes so as not to be misled or lulled into not seeking other employment opportunities.

The Board, with court approval, has consistently applied *Spruce Up* so as to safeguard the employee reliance interest. Therefore, when determining whether employees were promptly notified of the employer's intent to set initial terms, the *Spruce Up* standard sets the relevant point of analysis at the time the employer expresses its intent to retain sufficient employees to trigger a duty to bargain. The Board, with court approval, has rejected arguments that the relevant point of

analysis be any different. Additionally, the *Spruce Up* standard does not allow subsequent statements by the perfectly clear successor employer to vitiate a bargaining obligation once attached.

The Board's finding that First Student was a perfectly clear successor is entirely consistent with these principles. It is further supported by substantial evidence in the record. The Company's arguments to the contrary are meritless, and the Board's decision should be enforced.

ARGUMENT[4]

I. The Board's Decision in *Spruce-Up*

In *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972), the Supreme Court addressed the impact of employer succession on the bargaining rights of incumbent employees and their chosen union. There, the Supreme Court established the now-"fundamental principle of federal labor law that a new employer is generally free to decide upon the initial terms and conditions of employment for its employees." *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1361 (7th Cir. 1997); *Burns*, 406 U.S. at 294-95. The Court reasoned that, generally, there could be no statutory basis for a violation of Section 8(a)(5) of the NLRA when a

[4] The Union files this Brief in support of the NLRB and endorses the NLRB's arguments on brief. The Union, therefore, concurs with the NLRB that the Board is entitled to summary enforcement of all of its findings that First Student does not specifically contest. (*See* NLRB Br. 16).

successor employer establishes initial terms of employment, because the successor, as a new employer, did not previously provide incumbent employees any terms and conditions of employment "from which a change can be inferred." *Burns*, 406 U.S. at 294. The Court was also motivated by a policy concern associated with the fact that a "potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision." *Id*. at 287-88; *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) ("the Court in *Burns* was careful to safeguard the rightful prerogative of owners independently to rearrange their businesses." (citation and quotation marks omitted)). In that situation, "[s]addling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." *Id*. at 288.

"But, to the general rule that a successor employer may specify initial employment terms without first conferring with the union, the Court articulated an exception[.]" *Int'l Ass'n of Machinists v. NLRB*, 595 F.2d 664, 671 (D.C. Cir. 1978). According to the Supreme Court,

> [a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the

> employees in the unit and in which it will be appropriate to have him consult with the employees' bargaining representative before he fixes terms.

Burns, 406 U.S. at 294-95. The Court further explained that, "[i]n other situations," "it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union," as only then will it be evident "that the bargaining representative represents a majority of the employees in the unit[.]" *Id*. at 295. As the facts of *Burns* fell into the latter category, the Court had no further reason to elaborate on its "perfectly clear" exception.

While "the precise meaning and application of the Court's caveat is not easy to discern[,]" the Board took up the task of interpreting the Court's exception in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974). In *Spruce Up*, a successor employer expressed an intention to retain the incumbent employees, but simultaneously announced new terms of employment. *Id.* at *194*. The Board had to decide whether the employer fell into the Supreme Court's "perfectly clear" exception language.

The Board was sharply divided on approach. Two of its members in dissent, Members Fanning and Penello, argued for an expansive reading of the Supreme Court's exception. Both would have required that a bargaining obligation attaches whenever a successor employer expresses plans to retain the incumbent workers, regardless of whether the employer simultaneously announces that incumbent

workers would be hired under different terms and conditions of employment. *Id*. at 203-04, 207-08.

The majority rejected this expansive approach. The Board noted that the "right to unilaterally set initial terms" was a "right to which the Supreme Court attache[d] great importance in *Burns*." *Id*. at 195. This is so because the "*Burns* Court accorded much importance to a successor employer's freedom to alter – even remake – the acquired enterprise[,]" "includ[ing] the ability ordinarily to set initial employment terms and conditions without preliminary bargaining with an incumbent union." *Machinists*, 595 F.2d at 673. In order to properly protect this important right, the Board held that

> [w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court.

Spruce Up, 209 NLRB at 195. In such a situation, the "possibility that the old employees may not enter into an employment relationship with the new employer is a real one[,]" meaning "it is surely not 'perfectly clear' to either the employer or to [the Board] that he can 'plan to retain all of the employees in the unit[.]'" *Ibid*.

The dissenters' "construction of the *Burns* caveat emphasiz[ed] simply the employer's manifest intentions, rather than the probability of employee acceptance of jobs with the successor[.]" *Machinists*, 595 F.2d at 672. Adopting the

dissenters' position could result in successor employers "refrain[ing] from commenting favorably at all upon employment prospects of old employees[.]" *Spruce Up*, 209 NLRB at 195. Accordingly, in order to properly effectuate the vindication of an important employer interest in *Burns*, the Board majority rejected the dissenters' expansive interpretation of the "perfectly clear" exception.

At the same time, the Board recognized a countervailing employee interest that warranted "an important measure of protection." *Machinists*, 595 F.2d at 674. Successor employers often "intend[] to take advantage of the trained work force of [their] predecessors[,]" *Fall River Dyeing*, 482 U.S at 41, and so may express positive (and unconditioned) retention prospects to these employees. As this Court explained,

> unconditional retention-announcements engender expectations, ofttimes critical to employees, that prevailing employment arrangements will remain essentially unaltered. Even when incumbents are not affirmatively led to believe that existing terms will be continued, unless they are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force.

Machinists, 595 F.2d at 674-75.

The Board did not "ignore these concerns," and instead adopted a "construction of *Burns* [that] is responsive to them." *Id*. at 675. Ultimately, the Board held that

> the caveat in *Burns* [] should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer… has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Spruce Up, 209 NLRB at 195.

The Board's standard balanced the important employer interest in restructuring a newly-acquired business against incumbent employees' reliance interest. The standard protected the employer's right to restructure the business by applying to only those situations where the continuity of the union's majority status is not in doubt, as "a prospective employment relationship may be presumed when a successor has boldly declared an intention to retain incumbents but has not concurrently proposed substantially reduced benefits." *Machinists*, 595 F.2d at 675, fn. 49. At the same time, the standard protects employees' reliance interests by adopting a requirement that successor employers announce changes in terms and conditions prior to (or simultaneously with) an expression of an intention to retain incumbent employees. *Creative Vision Resources, LLC v. NLRB*, 882 F.3d 510, 518 (5th Cir. 2018) (quoting this Court's reliance concerns in *Machinists* as "rationale for prior or simultaneous announcement of new terms" requirement). A "prior-or-simultaneous-announcement requirement" "ensures that incumbent employees will not be 'lulled into a false sense of security' by a successor's announcement that it intends to retain the incumbents." *Id*. at 519, *quoting*

Machinists, 595 F.2d at 675. Thus, the Board's *Spruce Up* standard robustly protects employee reliance interests in the narrow band of situations where a union's majority status is not in doubt. *See S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 359 (D.C. Cir. 2009) ("at bottom, the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees misled or lulled into not looking for other work").

II. *Spruce Up*'s Progeny and the Protection of Employee Reliance Interests

The Board, with court approval, has consistently applied the *Spruce Up* standard to protect employee reliance interests. Below, the Union will discuss two such applications of *Spruce Up* relevant to arguments raised by the Company.

First, the Board and courts hold that, under *Spruce Up*, the relevant point of analysis to determine whether a successor has put incumbent employees on notice of changes to terms and conditions is when an employer expresses its intent to hire the incumbent employees.[5] *Nexeo Solutions, LLC*, 364 NLRB No. 44, sl. op. 6 (2016) (Board protects reliance interest by "consistently appl[ying]" "principle"

[5] Although the Supreme Court in *Burns* and the Board in *Spruce Up* talked in terms of retaining all incumbent employees, the requirement has long been clarified to only require an intention to retain a sufficient number of incumbent employees to make evident that the union's majority status will continue. *Nexeo Solutions*, 364 NLRB No. 44, sl. op. 5, fn. 19 (2016); *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841, 845 (6th Cir. 1976).

"that the obligation to bargain commences when a successor expresses an intent to retain its predecessor's employees without making clear that employment is conditioned on acceptance of new terms"); *see also, e.g.*, *Machinists*, 595 F.2d at 674 (Court found that the Board "may with ample reason conclude" that a bargaining obligation attached "when an employer has indicated a purpose to retain incumbents"), *id*. at 675, fn. 49 (discussing bargaining obligation that attaches when "successor indicates that he intends to reemploy his predecessor's workforce"), *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1007 (D.C. Cir. 1998) (bargaining obligation attaches when "it is 'perfectly clear' *ex ante*" "that the successor employer plans to retain" incumbent employees); *Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 505-06 (6th Cir. 2002) (rejecting notion that relevant point for analysis is at time successor employer commences operations, and instead is when successor announces its "inten[tion] to rehire a sufficient number of" incumbents).

Thus, contrary to the Company's urging (Pet. Br. 24-25), the Board and courts have rejected an application of *Spruce Up* that would make the relevant point of analysis when the employer makes offers of employment. *Adams & Assocs.*, 363 NLRB No. 193, sl. op. 3 (2016) ("The Board [in past cases] has also clarified that the exception is not limited to situations where the successor fails to announce initial employment terms before the hiring process begins."), *enfd*.

Adams & Assocs., Inc. v. NLRB, 871 F.3d 358, 373, fn. 6 (5th Cir. 2017) (announcement of new terms with offer letters was too late to defeat perfectly clear finding); *Canteen Co.*, 317 NLRB 1052, 1053 (1995) (Board rejected dissenters' argument that analysis should be whether successor has announced new terms prior to, or simultaneously with, the extension of unconditional offers of hire to incumbents, as such a rule is inconsistent with precedent and it does not take into account real possibility that incumbents would be "misled into believing" they would be retained with no changes to their terms of employment), *enfd*. *Canteen Corp. v. NLRB*, *supra*; *Machinists*, 595 F.2d at 675, fn. 49 (bargaining obligation can attach where successor indicates intent to reemploy incumbents two weeks before incumbents even submit applications, because incumbents "may not have sufficient time to rearrange their affairs," and be "forced to continue in the jobs").

Similarly, contrary to the Company's assertions (Pet. Br. 18-22), the Board and courts do not set the relevant point of analysis at when the successor enters into a contract to provide services. In *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841 (6th Cir. 1976), the Sixth Circuit found "it was 'perfectly clear' in early August that the Company intended to rehire a sufficient number of employees to maintain the Union's majority status" when a successor employer representative "informed the employees that he '(wanted) every man to stay on the job, and would carry on as usual[,]' even though the successor's negotiations to purchase the assets of the

predecessor employer did not conclude until September.[6] *Id*. at 843, 845. In *Fremont Ford*, 289 NLRB 1290 (1988), the Board affirmed the ALJ's finding that "on May 6" "it was 'perfectly clear' under *Burns* that [the successor] planned to retain a majority of" incumbent employees, even though a "sales and service agreement" was not entered into until May 7. *Id*. at 1291, 1296-97. In *Elf Atochem North Amer., Inc.*, 339 NLRB 796 (2003), the Board found a successor employer to be perfectly clear based on statements made the same day the successor entered into a "nonbinding letter of intent" that merely "outline[d] [] the general principles of [a stock] sale[;]" several months later the sale actually closed and the predecessor employer entered into a service agreement to provide bargaining unit

[6] The Company claims that the Sixth Circuit's decision in *Spitzer Akron* cited by the Board in rejecting the Company's argument in the instant matter, does not support the Board's position; however, it misleadingly attempts to prove this claim by citing to the *Board's* decision in *Spitzer Akron* which the Board in this matter did not cite. (Pet. Br. 19). Even then, the Company inaccurately describes the Board's decision. The Company claims that the Board relied solely on assurances made the day the successor entered into a purchase agreement for its perfectly clear finding. *Ibid*. The Board made no such finding. Instead, the Board determined that, on the day the sale was consummated, the successor employer met with incumbent employees and *announced new terms and conditions of employment*, the very changes that were the subject of the union's NLRB charge and the basis upon which the Board found a violation. *Spitzer Akron, Inc.*, 219 NLRB 20, 22-23 (1975). Aside from announcing these unilateral changes, the successor did not provide "various assurances to the predecessor's employees that they would be retained[,]" as the Company claims. (Pet. Br. 19). The Board's decision references the date of the sale simply to find that the successor was not free to unilaterally establish the initial terms of employment it announced on that date.

employees to the successor in advance of merging with successor. *Id*. at 796, 799-800; *see also Creative Visions*, 882 F.3d at 514, 521 (successor employer was perfectly clear based on statements made earlier on the same day that the contractor cancelled its contract with the predecessor employer and awarded the work to the successor).

Thus, contrary to the Company's assertions, the Board, with court approval, has consistently applied *Spruce Up* to find a perfectly clear succession where the successor does not announce that continued employment will be under new terms and conditions prior to or at the time it expresses an intent to retain the incumbent employees, as opposed to some later time. This point of analysis is justified by the need to protect employees' reliance interest, and is entirely consistent with *Spruce Up*.

In the second relevant application of *Spruce Up* that protects employee reliance interests, the Board and courts also consistently hold that statements made subsequent to an expression of intent to retain incumbents cannot detach a bargaining obligation. The Fifth Circuit in *Creative Visions* affirmed the Board's application of this "prior-or-simultaneous-announcement requirement." 882 F.3d at 518-20. In addition to citing in- and out-of-circuit precedent that endorsed the prior-or-simultaneous announcement requirement, the Fifth Circuit discussed the reliance concerns described in *Machinists* as justification for the requirement. *Ibid*.

Machinists itself similarly discusses this concern. 595 F.2d at 675, fn. 49. This Court in *Machinists* hypothesized about a successor employer that indicates an intent to retain the incumbent employees a month before taking over operations. *Ibid*. Two weeks later, employees who seek to apply for positions learn of new terms and conditions set by the successor. *Ibid*. Even though in this situation employees may still be able to seek other employment prior to the commencement of successor's operations, a bargaining obligation may still attach. *Ibid*. According to this Court, a bargaining obligation is still warranted because employees may "lack sufficient time to rearrange their affairs," forcing them to "continue in their jobs[.]" *Ibid*. Even where this may not be the case, "a bargaining obligation may be essential to protect the employees from imposition resulting from lack of notice[,]" and this obligation causes no injustice as it "is a product of [the successor's] own misleading conduct." *Ibid*.

The Company, then, has no support for its claim that once a bargaining obligation attaches pursuant to perfectly clear successor status, subsequent statements can "undo" that status. (Pet. Br. 30). The Board, with court approval, has rejected this application of *Spruce Up* as inconsistent with that standard's need to protect employees' reliance interest.

III. The Board's Decision is Consistent with *Spruce Up* and its Progeny

The Company claims the Board applied a standard in its decision that is inconsistent with *Spruce Up*. An examination of the Board's decision shows that it, in fact, applied *Spruce Up* in line with the well-established principles discussed above.

After discussing *Burns* and the standard announced in *Spruce Up*, the Board stated that a "bargaining obligation attaches when a successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms." (JA 631, *quoting Nexeo Solutions*, 364 NLRB No. 44, sl. op. at 5-6). It then sought to determine when the Company first expressed an intent to retain the incumbent bus drivers. (*Ibid*.). Examining the record of the Company's conduct on March 2 and May 16, the Board established that the Company first expressed an intent to retain the drivers on March 2. (*Ibid*.). It then turned to the question of whether it clearly announced its intent to establish a new set of conditions prior to or simultaneous with this expression of intent. (*Ibid*.). Again reviewing the record, it determined that the Company had not. (*Ibid*.).

The Board majority then rejected the ALJ and the dissent's argument that the Company's May 17 announcement of new terms was timely and vitiated the

bargaining obligation. (*Id*. at 4). In rejecting the dissent's view, the majority stated that such a restrictive rule

> does not take into account the significant reliance employees may place on statements of intent to hire, to the exclusion of other employment opportunities. Holding a successor to its initial statements of intent, even when those statements are made before formal offers of employment are extended or transfer of ownership of operations is complete, prevents employers from inducing such reliance, only later to reveal that the employees' terms of employment will be changed.

(*Ibid*.). The Board also rejected the Company's argument that no bargaining obligation could attach prior to the Company entering into a contract with the District. (JA 632, fn. 13).

The Board's analysis is entirely consistent with the *Spruce Up* principles discussed above, and rests on the same policy concern – employee reliance – identified in *Spruce Up*. The Board looked to when the Company first told the bus drivers it intended to retain them, regardless of whether there was a contract in place at that time or not; examined whether the Company prior to or simultaneous with that point in time clearly announced an intention to establish different terms of employment as a condition for continued employment; and refused to allow subsequent statements detach a bargaining obligation because it would cause damage to the employee reliance protections inherent in the Board's *Spruce Up* standard. The Company's claim that the Board's analysis was inconsistent with *Spruce Up* is meritless.

IV. The Board's Finding that the Company was a Perfectly Clear Successor is Supported by Substantial Evidence in the Record

The Company's claim that the Board's perfectly clear successor finding is not supported by substantial evidence in the record is also without merit. Notably, the Company offers no real argument that the evidence in the record is insufficient for the Board to have reached its factual findings. Instead, it relies entirely on legal arguments regarding what evidence should be relevant; arguments that are meritless for the reasons discussed above. Irrespective of any argument by the Company, and as demonstrated by the facts as set forth above, there is more than substantial evidence to support the Board's finding.

As early as a meeting in July 2011, at the start of the District's subcontracting process, the Company assured the Union that its intention was to hire as many of the current employees as possible, which is consistent with its previous experiences of retaining high percentages of employees after securing a transportation contract. (JA 640; 141-44). Indeed, the Company stated that it would hire everyone who met the Company's hiring criteria, which was virtually identical to the District's criteria for employment and which every unit employee had already met. (JA 630, 640; 14, 37-39, 66, 74, 54-55). Further, the Company told the Union that it would maintain the employees' wages and provide comparable benefits. (JA 640; 35-37).

The District postponed subcontracting the transportation services for a brief time, but on February 10, 2012, the Superintendent recommended that First Student be awarded the contract, and on February 23, 2012, the District told bargaining unit employees in a meeting that it had decided to go with First Student, but was still hammering out some details. (JA 11).

On March 2, the District held a mandatory meeting for all the bargaining unit employees that also was attended by two Company representatives. (JA 630, 641; 99, 149). According to Meek, the Company's area General Manager, the purpose of the meeting was "to relieve the anxiety of the employees." (JA 126, 136; *see also* 64 (bus assistant testimony that employees were "riled up"); 641 (purpose of the meeting was to discuss the transition of bus services from the District to Company and allow the employees to ask questions of the Company)). Meek spoke about what the employees could expect over the coming weeks, as a contract was finalized between the Company and the District. (JA 641).

Among other things, Meek stated that the Company "wanted to hire as many" of the employees "as possible," and that it "typically [] hire[s] 80 to 90 percent of the existing workforce." (JA 630, 641; 130). The Company continued to explain that if employees completed an application along with the background check, drug screen, and physical examination, and received certain training, they would be hired. (JA 641). Again, these hiring criteria mirrored requirements

already applied by the District. (JA 630). Meek told the employees to expect a "smooth transition." (JA 73). First Student officials at this meeting did not say that employees' terms and conditions of employment would be different upon transitioning to First Student. (JA 64-65; 82-85). Rather, Meek stated that certain other terms "would be subject to negotiations" with the Union. (JA 630, 641; 151). Meek also stated that First Student would continue to use the District's routing system for determining routes and the number of hours employees could expect to work. (JA 630, 641; 123-24).

The District and Company reached an agreement in early May that was to be approved by the School Board on May 16. At a public hearing, attended by the Union and several bargaining unit members, the Company reiterated what it told bargaining unit employees on March 2.

The "focus of the meeting was ensuring that the employees received the same rate of pay and then also comparable benefits because that was the concern of the board and the superintendent." (JA 103). Daniel Kinsley, the Company's Business Development Manager, again assured that First Student would hire all incumbent bus drivers and assistants that submitted applications and met the standard hiring criteria. (JA 630, 642; 14, 20-22, 26-27, 33, 38-39, 66, 74, 102-103). These employees would be hired at the same rate of pay and would be provided "comparable" benefits. (JA 14, 21-22, 103). Kinsley repeated Meek's

prior statements about recognizing the Union—specifically, that First Student would recognize the Union if it hired a majority of the current workforce. (JA 630, 642; 153-54, 164-65). As explained above, the Company always coupled references to the "51 percent" or the majority of the workforce with assurances that the percentage would not be a problem. (*See* JA 40, 64, 72-73, 143, 164-65, 171). Kinsley testified that it was First Student's "intention" and "goal" to hire a majority of the unit employees and he and other representatives continually made this known to the Union and the employees. (JA 143, 164-65).

While Company representatives made these assurances regarding its intention to retain the unit employees, those same representatives did not clearly announce the Company's intention to set new terms and conditions of employment prior to bargaining with the Union. (JA 642; 169 ("[y]ou didn't tell them that any terms and conditions of employment would change once they became First Student employees, did you?" . . . "I did not say that.")).

After the School Board approved the contract, Kinsley again told the Union and bargaining unit members that its goal was to hire as many incumbent employees as possible, that it would maintain the existing wages, and that they "shouldn't have anything to worry about[.]" (JA 630, 643; 157).

These facts demonstrate that there is substantial evidence to support the Board's finding that First Student was a perfectly clear successor that needed to

bargain with the Union prior to altering employees' terms and conditions on May 17. Through its statements on March 2 and May 16, the Company removed any doubt regarding the continuity of the Union's majority status after the employment transition. The Company repeatedly assured the Union, employees, and the District that its intention and goal was to hire a majority of the incumbent employees, and that it would anticipate hiring 80 to 90 percent of these employees based on past experience. Thus, as of those dates, the Company has expressed an intention to retain enough bargaining unit employees for the Union's majority to continue.

The facts further demonstrate that the Company had not clearly announced an intention to unilaterally establish initial terms and conditions. On neither March 2 nor May 16, or at any time during the subcontracting process, did the Company announce any intended changes to terms and conditions, though, it had ample opportunity to do so.[7] Instead, it repeatedly assured the Union, employees, and the District that it would maintain the same wages and comparable benefits. *See Elf Atochem*, 339 NLRB at 796 (employer that told incumbents that they would receive "equivalent salaries and comparable benefits" was a perfectly clear

[7] A failure to announce specific changes to terms and conditions prior to or simultaneous with an expression of intent to retain incumbent employees is not dispositive of a perfectly clear successor finding, as long as the successor clearly manifests an intention to unilaterally establish initial terms. Contrary to the Company (Pet. Br. 25-27), that is the teaching of *S&F Market*, 570 F.3d at 451-52.

successor). As to other terms, the Company said exactly what a perfectly clear successor would say, that those terms would be subject to bargaining with the Union. *Rail & Road Servs.*, 348 NLRB 1160, 1162 (2006) (employer was a perfectly clear successor where it "indicated a desire to make some changes to the existing employment terms, [but] repeatedly made clear that it intended to negotiate any such changes with the Union"). Under *Burns*, the obligation of a perfectly clear successor is to "initially consult with the [union] before [] fix[ing] terms[,]" not to assume the extant collective bargaining agreement.[8] 406 U.S. at 291, 295. The Company's statement expressed an intention to do just that – it would bargain with the Union prior to fixing terms. As the perfectly clear "inquiry" "is conducted from the employee's perspective[,]" *Adams & Assocs.*, 871 F.3d at 373, fn. 6, the Company's statements would not have put the Union or

[8] Here lies the flaw in the Company's claim that an employer clearly manifests an intention to establish initial terms by announcing that it will not assume the existing collective bargaining agreement. (Pet. Br. 29). As no successor, perfectly clear or not, must assume an existing collective bargaining agreement, merely announcing you will not assume the CBA does not put employees on notice that the employer seeks to set initial terms. More is needed, as demonstrated by the cases cited by the Company. *See, e.g., Banknote Corp. of Amer.*, 315 NLRB 1041, 1043 (1994) (employer not a perfectly clear successor where it wrote a letter specifically disavowing any commitment to recognize the unions or "be bound by the terms and conditions of the existing collective bargaining agreements"), *Marriot Mgt. Servs, Inc.*, 318 NLRB 144, 144, 145-46 (1995) (employer not a perfectly clear successor where it raised objections to contract's health and welfare plan and pension plan, and expressed that it "would not recognize the terms and conditions of the extant collective-bargaining agreement").

employees on notice that the Company planned to extend job offers contingent on accepting new terms of employment.

Thus, the Board's finding that First Student was a perfectly clear successor is supported by substantial evidence in the record. The Company's limited argument to the contrary is without merit.

CONCLUSION

For the reasons stated above, the Union respectfully requests that this Court deny the Company's Petition for Review and grant the NLRB's Application for Enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,002 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

Respectfully submitted,

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